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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BOK SIL RAH, an individual, ) Case No. CV 12-09166 DDP (VBKx)  
Plaintiff, ) ORDER GRANTING DEFENDANTS' MOTION  
v. ) TO DISMISS  
AURORA LOAN SERVICES, LLC, a ) [Dkt. No. 5]  
Delaware Limited Liability )  
Company; NATIONSTAR MORTGAGE )  
LLC, a Delaware Limited )  
Company, )  
Defendants. )  
\_\_\_\_\_ )

Presently before the court is Defendants Aurora Loan Services LLC's and Nationstar Mortgage LLC's Motion to Dismiss Plaintiff's Complaint.

I. BACKGROUND

Plaintiff alleges she is the lawful owner of the real property located at 20713 Seine Avenue, Lakewood, California, 90715 (the "Subject Property"). (Compl. ¶ 8.) On July 2, 2012, Plaintiff filed a voluntary petition under Chapter 13 or title 11 of the United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the Central District of California, Los

1 Angeles Division. (Compl. ¶ 9.) Plaintiff remained as debtor in  
2 possession. On July 3, 2012, Defendants conducted a non-judicial  
3 foreclosure trustee sale and sold the Subject Property at a public  
4 auction. (Compl. ¶ 16.) Plaintiff alleges that Defendants Aurora  
5 and Nationstar wrongfully foreclosed upon her property in violation  
6 of California Civil Code § 2923.5 and willfully violated an  
7 automatic stay under Section 362(a) of the Bankruptcy Code, 11  
8 U.S.C. § 362. She seeks a money judgment, punitive damages, a  
9 judicial declaration that the July 3, 2012, sale was void and  
10 improper, restoration of her record title to the Subject Property,  
11 reasonable attorney's fees and costs, and other appropriate relief.  
12

## 13 II. LEGAL STANDARD

14 Under Federal Rule of Civil Procedure 12(b)(6), a complaint is  
15 subject to dismissal when the plaintiff's allegations fail to state  
16 a claim upon which relief can be granted. "When determining  
17 whether a complaint states a claim, a court must accept as true all  
18 allegations of material fact and must construe those facts in the  
19 light most favorable to the plaintiff." Resnick v. Hayes, 213 F.3d  
20 443, 447 (9th Cir. 2000).

21 In Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009), the Supreme  
22 Court explained that a court considering a 12(b)(6) motion should  
23 first "identify[] pleadings that, because they are no more than  
24 conclusions, are not entitled to the assumption of truth." Id.  
25 Next, the court should identify the complaint's "well-pleaded  
26 factual allegations, . . . assume their veracity and then determine  
27 whether they plausibly give rise to an entitlement to relief."  
28 Id.; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th

1 Cir. 2009) ("In sum, for a complaint to survive a motion to  
2 dismiss, the non-conclusory factual content, and reasonable  
3 inferences from that content, must be plausibly suggestive of a  
4 claim entitling the plaintiff to relief") (internal quotation marks  
5 omitted).

6 III. DISCUSSION

7 Defendants argue that Plaintiff lacks standing to challenge  
8 the foreclosure sale because she has not tendered the amount owed  
9 under the promissory note. "When a debtor is in default of a home  
10 mortgage loan, and a foreclosure is either pending or has taken  
11 place, the debtor must allege a credible tender of the amount of  
12 the secured debt to maintain any cause of action for wrongful  
13 foreclosure." Alicea v. GE Money Bank, 2009 WL 2136969 \*3 (N.D.  
14 Cal. 2009). The tender requirement spares courts from being called  
15 upon to "order a useless act performed" in cases where plaintiffs  
16 would be unable, even under proper sale procedures, to redeem a  
17 property. FPCI RE-HAB 01 v. E & G Investments, Ltd., 207  
18 Cal.App.3d 1018, 1021-22 (1989). An exception to the tender rule  
19 may apply, however, where it would be inequitable to require  
20 tender. Onofrio v. Rice, 55 Cal. App. 4th 413, 424 (1997). Courts  
21 have applied the equitable exception to the tender rule where  
22 plaintiffs contest the validity of a foreclosure prior to the  
23 foreclosure sale. See, e.g., Tamburri v. Suntrust Mortgage, Inc.,  
24 2011 WL 6294472 \*3, 5 (N.D. Cal. December 15, 2011); Sacchi v.  
25 Mortgage Electronic Registration Systems, Inc., 2011 WL 2533029 \*9-  
26 10 (C.D. Cal. June 24, 2011).

27 Defendants also argue that Plaintiff has failed to state a  
28 wrongful foreclosure claim under California Civil Code § 2923.5

1 because the foreclosure sale has already been held. See Mabry v.  
2 Superior Court, 185 Cal.App.4th 208, 221 (2010) (noting that "under  
3 the plain language of section 2923.5, read in conjunction with  
4 section 2924g, the only remedy provided is a postponement of the  
5 sale before it happens."). Finally, they argue that Plaintiff  
6 fails to state a claim for a violation of the Bankruptcy Code's  
7 automatic stay because Defendant Aurora obtained in rem relief  
8 under 11 U.S.C. § 362(d)(4) in the bankruptcy case of Henry Gibson,  
9 II, concerning the Subject Property.

10 Defendants' Motion was set for hearing on December 18, 2012.  
11 Per Local Rule 7-9, any opposition had to be filed 21 days before  
12 the hearing date, which made Plaintiff's deadline November 27,  
13 2012. Plaintiff filed this Opposition on December 4, 2012, one  
14 week late. Because of this, the court need not consider the  
15 Opposition. In any case, Plaintiff's Opposition does not address  
16 the substantive issues raised by Defendant. She has presented no  
17 facts suggesting that equitable exception to the tender rule should  
18 apply, nor does she contest Aurora's assertion that Aurora had  
19 obtained in rem relief such that the Bankruptcy Code's automatic  
20 stay provision was not violated. By failing to make any  
21 substantive arguments in her Opposition, Plaintiff is effectively  
22 conceding Defendants' points.

23 Instead, Plaintiff asks the court to deny the Motion as moot  
24 because she "intends and will file and serve a first amended  
25 complaint." (Opp. at 3.) Additionally, she requests that the  
26 court remand the case back to Superior Court. To date, Plaintiff  
27 has not filed a First Amended Complaint, and the court cannot  
28

1 remand the case to state court because Plaintiff filed it in  
2 federal court.

3 In short, Plaintiff's Opposition is unacceptably late,  
4 requests relief the court obviously cannot provide because of  
5 Plaintiff's own actions, and is devoid of any substantive argument.  
6 Plaintiff's attorneys are admonished to make no future untimely and  
7 meritless filings or they may face sanctions.

8 **IV. CONCLUSION**

9 Because Plaintiff has not substantively opposed the Motion to  
10 Dismiss, the court GRANTS the Motion. The Complaint is dismissed.

11  
12 IT IS SO ORDERED.

13  
14  
15 Dated: January 10, 2013



DEAN D. PREGERSON  
United States District Judge